A

# Ayob bin Salleh v AmGeneral Insurance Bhd & Anor

B HIGH COURT (KUALA LUMPUR) — SUIT NO 22NCVC-162–04 OF 2014
S NANTHA BALAN JC
29 JULY 2015

C *Insurance — Claims — Lapse of time — Repudiation of liability — Claim by insured under insurance policy — Liability repudiated by insurer — Claim commenced nine years after liability repudiated by insurer — Whether insured's claim against insurer time barred — Whether insured's oral communications with insurer's officers revived the cause of action — Whether waiver and estoppel* D *applicable to defeat defence of limitation — Limitation Act 1953 s 6*

*Insurance — Construction of policy — Exception clause — Ambiguity — Whether to apply contra proferentem rule*

E

*Insurance — Motor insurance — Liability — Risk against 'theft' — Car stolen by persons impersonating as motor repossessors from finance company — Repudiation of liability by insurer — Whether there was cheating/criminal* F *breach of trust by the insured — Whether exception under policy absolved insurer of liability — Whether liability repudiated*

*Limitation — Accrual of cause of action — Civil claim — Time begins from* G *earliest point of time when plaintiff could have commenced an action*

*Limitation — Insurance policy — Claim under contract of insurance — Whether claim barred by s 6 of the Limitation Act 1953 — Claim commenced nine years after liability repudiated by insurer — Whether insured's oral* H *communications with insurer's officers revived the cause of action — Whether waiver and estoppel applicable to defeat defence of limitation — Limitation Act 1953 s 6*

I On 6 January 2005, the plaintiff's car was taken from him by three persons who impersonated as motor repossessors from the finance company that had given hire purchase financing for the car. In fact, they were not repossessors but merely thieves. At that point of time, the plaintiff was in default of the hire purchase payments. The first defendant was the insurer of the car. The policy of insurance ('the policy') provided cover for loss due to theft. However, the

plaintiff's claim under the policy for loss of the insured vehicle due to theft was rejected by the first defendant. The first defendant relied on an exception under the policy which absolved them of liability in instances where there was an element of 'cheating/criminal breach of trust' ('the exception'). The first defendant took the position that the loss of the car was not due to theft but rather due to cheating by impersonation, hence they were not liable under the exception. The first defendant also maintained that the plaintiff's claim was barred by virtue of s 6 of the Limitation Act 1953. The defendant had repudiated liability through a letter dated 16 September2005. The plaintiff had sent a letter dated 27 October 2005 appealing for a reconsideration of his claim. The defendant replied by letter dated 30 December 2005 and maintained their stand. The present suit was only filed on 7 April 2014. The plaintiff's answer to the defendant's plea of limitation was that his claim/appeal to the defendant was still alive as he had spoken to an officer in the defendant's office and was told that it was being considered. As such, it was contended that time was still at large and that limitation had not set in. The plaintiff relied on waiver and estoppel in order to defeat the defence of limitation. The first defendant contended that although the plaintiff himself was not implicated in the theft of the vehicle, the fact that he voluntarily handed over the keys to the purported 'repossessors' from the financier was sufficient to trigger the exception. The plaintiff argued that even if the factual matrix of the case was to be regarded as giving rise to an act of cheating by impersonation, there was enough doubt or controversy about the meaning to be placed on the exception as would entitle the plaintiff to invoke the contra proferentem rule. The issues that had to be determined were: (a) whether the plaintiff's claim fell within the exception; and (b) whether the plaintiff's claim was time barred.

**Held,** dismissing the plaintiff's claim with no order as to costs:

(1) The plaintiff did not say or admit that he voluntarily gave up the keys. The plaintiff explained that he had no choice and that the situation at the scene was such that he felt compelled to hand over the keys to the men who claimed that they were repossessors. Hence, the plaintiff was only a victim of a crime; *Malaysian Motor Insurance Pool (formerly known as HRMIP) v Naza Motor Trading Sdn Bhd* [2012] 1 MLJ 16 referred (see paras 25–26 & 30).

(2) It was not entirely clear from the exception that liability may be denied even where the insured is not implicated in any cheating and is in fact a victim of cheating. The exception to the policy did not apply as this was a case of theft. In any event, there was enough doubt or ambiguity as to whether the exception applied when the insured was a victim of cheating by impersonation such that the clause in the said policy was to be construed contra proferentem against the insurer (the defendant); *Malaysia National Insurance Sdn Bhd v Abdul Aziz bin Mohamed Daud* [1979] 2 MLJ 29 and *Syarikat Uniweld Trading v The Asia Insurance Co*

*Ltd* [1996] 2 MLJ 160 referred (see paras 35–36 & 43).

(3) Time begins to run from the earliest point of time when the plaintiff could commence an action. The critical question for purposes of limitation is: when did the cause of action arise (see paras 53–54).

(4) By the defendant's letter dated 16 September 2005, it was clear that the defendant was declining liability. Upon receipt of this letter, the plaintiff was already entitled to commence an action for wrongful repudiation of the contract of insurance between the plaintiff and the defendant. Therefore the plaintiff had to file his action within six years from 16 September 2005 failing which the action would be time barred. The present action which was filed on 7 April 2014 was plainly time barred (see paras 55–56).

(5) There was nothing to corroborate the plaintiff's claim that he spoke to an officer of the defendant who had assured him that his claim was being considered. Even if the plaintiff had spoken to someone, it does not immediately translate into a sort of estoppel or waiver against the defendant (see para 58).

(6) If estoppel or waiver is to be raised then the factual basis has to be clearly and precisely demonstrated. The plaintiff's basis for asserting estoppel or waiver against the defendant fell completely flat as he had not identified the officer or staff concerned and had not precisely recounted what was promised. It was unlikely that the defendant's officer or staff would have promised the plaintiff that his claim would be entertained. Even if a promise was made, it would be necessary to determine whether the promise (if any) was made by someone who was authorised to make the so-called promise (see paras 59–60).

**[Bahasa Malaysia summary**

Pada 6 Januari 2005, kereta plaintif telah diambil daripadanya oleh tiga orang yang menyamar sebagai penarik kereta daripada syarikat kewangan yang telah memberikan pembiayaan sewa beli untuk kereta itu. Pada hakikatnya, mereka bukan penarik kereta tetapi adalah pencuri. Pada masa itu, plaintif gagal membuat bayaran sewa beli. Defendan pertama adalah syarikat insurans kereta itu. Polisi insurans ('polisi tersebut') memberikan perlindungan untuk kehilangan akibat kecurian. Walau bagaimanapun, tuntutan plaintif di bawah polisi tersebut untuk kerugian kenderaan yang diinsuranskan akibat kecurian telah ditolak oleh defendan pertama. Defendan pertama bergantung kepada pengecualian di bawah polisi tersebut yang membebaskan mereka daripada liabiliti dalam keadaan di mana terdapat elemen 'cheating/criminal breach of trust' ('pengecualian itu'). Defendan pertama mengambil kedudukan bahawa kehilangan kereta itu bukan akibat kecurian tetapi akibat penipuan melalui penyamaran, justeru mereka tidak bertanggungjawab di bawah pengecualian itu. Defendan pertama juga menegaskan bahawa tuntutan plaintif telah luput

menurut s 6 Akta Had Masa 1953. Defendan telah menolak liabiliti melalui surat bertarikh 16 September 2005. Plaintif telah menghantar surat bertarikh 27 Oktober 2005 merayu pertimbangan semula tuntutannya. Defendan menjawab melalui surat bertarikh 30 Disember 2005 dan menegaskan pendirian mereka. Guaman ini hanya difailkan pada 7 April 2014. Jawapan plaintif terhadap pli had masa defendan adalah bahawa tuntutan/rayuannya kepada defendan masih berterusan kerana dia telah bercakap kepada pegawai di pejabat defendan dan diberitahu ia sedang dipertimbangkan. Oleh itu, ia telah dihujahkan bahawa masa masih berjalan dan bahawa had masa belum bermula. Plaintif bergantung kepada penepian dan estopel bagi tujuan menggagalkan pembelaan had masa. Defendan pertama berhujah bahawa meskipun plaintif sendiri tidak dikaitkan dalam kecurian kenderaan itu, fakta bahawa dia dengan suka rela menyerahkan kunci kepada 'repossessors' daripada pembiaya kewangan adalah mencukupi untuk mencetus pengecualian itu. Plaintif berhujah bahawa meskipun matriks faktual kes dianggap menyebabkan berlaku tindakan penipuan melalui penyamaran, terdapat keraguan atau kontroversi yang mencukupi berkaitan maksud yang diletakkan kepada pengecualian yang memberi plaintif hak untuk menggunakan rukun *contra proferentem*. Isu-isu yang perlu ditentukan adalah: (a) sama ada tuntutan plaintif terjatuh bawah pengecualian itu; dan (b) sama ada tuntutan plaintif telah luput had masa.

**Diputuskan,** menolak tuntutan plaintif tanpa perintah untuk kos:

(1) Plaintif tidak menyatakan atau mengaku bahawa dia secara suka rela memberikan kunci tersebut. Plaintif menjelaskan bahawa dia tiada pilihan dan bahawa situasi di tempat kejadian tersebut sehingga dia merasa terdesak untuk menyerahkan kunci tersebut kepada lelaki yang mendakwa mereka adalah penarik kereta. Justeru, plaintif hanya mangsa jenayah; *Malaysian Motor Insurance Pool (formerly known as HRMIP) v Naza Motor Trading Sdn Bhd* [2012] 1 MLJ 16 dirujuk (lihat perenggan 25–26 & 30).

(2) Ia tidak jelas keseluruhannya daripada pengecualian itu bahawa liabiliti mungkin dinafikan meskipun di mana orang yang diinsuranskan tidak terlibat dalam apa-apa penipuan dan pada hakikatnya mangsa penipuan. Pengecualian itu kepada polis tersebut tidak terpakai kerana ini adalah kes kecurian. Dalam apa keadaan, terdapat keraguan atau kekaburan yang mencukupi berhubung sama ada pengecualian itu terpakai apabila orang yang diinsuranskan merupakan mangsa penipuan melalui penyamaran sehinggakan fasal dalam polisi tersebut perlu ditafsirkan *contra proferentem* terhadap pemberi insurans ('defendan tersebut'); *Malaysia National Insurance Sdn Bhd v Abdul Aziz bin Mohamed Daud* [1979] 2 MLJ 29 dan *Syarikat Uniweld Trading v The Asia Insurance Co Ltd* [1996] 2 MLJ 160 dirujuk (lihat perenggan 35–36 & 43).

(3) Masa bermula daripada poin terawal masa apabila plaintif boleh memulakan tindakan. Persoalan kritikal bagi tujuan had masa adalah: bila kausa tindakan timbul (lihat perenggan 53–54).

(4) Melalui surat defendan bertarikh 16 September 205, ia jelas bahawa defendan menolak liabiliti. Setelah menerima surat ini, plaintif telah pun diberi hak untuk memulakan tindakan untuk pembatalan salah kontrak insurans antara plaintif dan defendan. Oleh itu plaintif telah memfailkan tindakannya dalam tempoh enam tahun dari 16 September 2005 dan jika gagal tindakan itu akan luput had masa. Tindakan ini yang telah difailkan pada 7 April 2014 jelas telah luput had masa (lihat perenggan 55–56).

(5) Tiada apa-apa yang menyokong tuntutan plaintif bahawa dia telah bercakap kepada pegawai defendan yang menjaminnya bahawa tuntutannya sedang dipertimbangkan. Jikapun plaintif telah bercakap kepada seseorang, ia tidak membentuk serta merta kepada suatu estopel atau penepian terhadap defendan (lihat perenggan 58).

(6) Jika estopel ditimbulkan maka asas faktual perlu dinyatakan dengan jelas dan tepat. Asas plaintif untuk menegaskan estopel atau penepian terhadap defendan telah gagal kerana dia tidak mengenali pegawai atau staf berkaitan dan tidak menepati apa yang dijanjikan. Ia tidak mungkin pegawai atau staf defendan telah berjanji kepada plaintif bahawa tuntutannya akan dilayan. Jikapun janji telah dibuat, ia perlu ditentukan sama ada janji itu (jika ada) telah dibuat oleh seseorang yang diberi kuasa untuk membuat janji tersebut (lihat perenggan 59–60).]]

**Notes**

For a case on exception clause, see 8(1) *Mallal's Digest* (5th Ed, 2015) para 60.
For cases on accrual of cause of action in general, see 9 *Mallal's Digest* (4th Ed, 2014 Reissue) paras 2174–2193.
For cases on insurance policy in general, see 9 *Mallal's Digest* (4th Ed, 2014 Reissue) paras 2377–2382.
For cases on lapse of time, see 8(1) *Mallal's Digest* (5th Ed, 2015) paras 51–52.
For cases on liability, see 8(1) *Mallal's Digest* (5th Ed, 2015) paras 425–431.

**Cases referred to**

*Malaysia National Insurance Sdn Bhd v Abdul Aziz bin Mohamed Daud* [1979] 2 MLJ 29, FC (refd)
*Malaysian Motor Insurance Pool (formerly known as HRMIP) v Naza Motor Trading Sdn Bhd* [2012] 1 MLJ 16, FC (folld)
*Nadefinco Ltd v Kevin Corporation Sdn Bhd* [1978] 2 MLJ 59, FC (refd)
*Reeves v Butcher* [1891] 2 QB 509, CA (refd)
*Syarikat Kemajuan Timbermine Sdn Bhd v Kerajaan Negeri Kelantan Darul Naim* [2015] 3 MLJ 609, FC (refd)

*Syarikat Uniweld Trading v The Asia Insurance Co Ltd* [1996] 2 MLJ 160, HC (refd)
*Tenaga Nasional Bhd v Kamarstone Sdn Bhd* [2014] 2 MLJ 749, FC (refd)

**Legislation referred to**

Limitation Act 1953 s 6, 6(1)(a)
Penal Code ss 378, 416

*Ragumaren Gopal (G Ragumaren & Co) for the plaintiff.*
*Leslie Bala and Sivaneswari (Othman Hashim & Co) for the defendant.*

**S Nantha Balan JC:**

INTRODUCTION

**[1]** This is an unfortunate case. On 6 January 2005, the plaintiff's motor vehicle was taken from him by three persons who impersonated as motor repossessors from the finance company that had given hire purchase financing for the motor vehicle. In fact, they were not repossessors. They were persons who belonged to the nefarious trade of motor thieves. As far as the plaintiff is concerned, the motor vehicle was stolen by these three persons. But the insurers of the motor vehicle have a different view. The insurer of the motor vehicle was the first defendant. The policy of insurance provided cover for loss due to theft. However, the plaintiff's claim under the insurance policy for loss of the insured vehicle due to theft was rejected by the first defendant. The first defendant relied on an exception under the policy which absolved them of liability in instances where there is an element of 'cheating/criminal breach of trust'. The first defendant took the position that the loss of the vehicle was not due to theft but rather due to cheating by impersonation, hence they were not liable under the exception to the policy of insurance.

**[2]** Initially, the first defendant's denial of liability was predicated on a veiled allegation that the plaintiff was somehow implicated in the loss of the insured vehicle. However, during trial, the first defendant took the stance that the plaintiff was not implicated in a criminal sense vis a vis the loss of the insured vehicle. Nevertheless, the first defendant maintained that the exception to the insurance policy still applied. In any event, the first defendant also maintained that the plaintiff's claim was barred by virtue of s 6 of the Limitation Act 1953.

**[3]** The plaintiff in this action is Ayob bin Salleh ('the plaintiff'). The plaintiff's claim in this action is based on a motor vehicle insurance policy which was issued by Kurnia Insurans (M) Bhd. The insurers are now known as AmGeneral Insurance Bhd (No Syarikat: 44191-P). The plaintiff's suit was initially against AmGeneral Insurance Bhd ('the first defendant') and CIMB

Bank Bhd ('the second defendant'). The plaintiff had obtained hire purchase financing from Southern Finance Bhd ('the financier'). The financier eventually merged with CIMB Bank Bhd. However, the plaintiff has since withdrawn his claim against CIMB Bank Bhd. As such, this claim subsists as against AmGeneral Insurance Bhd only and they will be referred to as 'the defendant'.

THE FACTUAL MATRIX

**[4]** At all material times the plaintiff was a registered owner of a motor vehicle namely a Mercedes Benz Model E250 bearing registration No BGF 292 ('the said vehicle'). The defendant had provided insurance coverage for the said vehicle under a motor insurance policy No HB-3-03-C-020020 covering the period from 23 April 2004–22 April 2005 (hereinafter referred to as 'the said policy'). The said policy covers any claim for theft of the said vehicle.

**[5]** The plaintiff's claim under the said policy arises out of an incident of an alleged theft which is said to have occurred 6 January 2005. At the material time the said vehicle was being driven by the plaintiff along Jalan Langat in Klang, Selangor. There is no dispute that the incident which resulted in the loss of the said vehicle occurred during the period when the said policy was in force.

**[6]** As stated earlier, the plaintiff had taken motor vehicle financing in the form of hire purchase from the financier. The plaintiff was in default of the hire purchase payments. The financier commenced legal action against the plaintiff and judgment in default was entered against the plaintiff on 19 October 2004 in Kuala Lumpur Sessions Court Summons No S1-52–19254 of 2004 (see p 13A Bundle A). It is apparent from the documentary evidence that the plaintiff had been making payments to the financier from 8 September 2004–14 February 2011.

**[7]** The incident which resulted in the loss of the said vehicle occurred on 6 January 2005 at around 10.30am. The plaintiff lodged a police report on the same day. However, he took some time to notify the defendant of the alleged theft of the said vehicle. The motor accident notification/claim form dated 10 March 2005 and the plaintiff's police report dated 6 January 2005 were only submitted by the plaintiff to the defendant on 14 March 2005.

**[8]** The defendant swiftly appointed an adjuster to investigate the claim. Based on investigations that were conducted, the first defendant came to the conclusion that the plaintiff's claim fell within the exception to section A(4)(e) of the said policy which states that liability will be declined for:

> any loss or damage caused by or attributed to the act of *cheating/criminal breach of trust by any person* within the meaning of the definition of the offence of

cheating/criminal breach of trust set out in the Penal Code. (Emphasis added.)

Section 416 of the Penal Code defines cheating as follows:

416 A person is said to 'cheat by personation', if he cheats by pretending to be some other person, or by knowingly substituting one person for another, or representing that he or any other person is a person other than he or such other person really is.

**[9]** Hence, the defendant issued a letter dated 16 September 2005 and repudiated liability. The present suit was filed on 7 April 2014. The plaintiff contends that the defendant had wrongfully repudiated liability under the said policy. The plaintiff has prayed for following reliefs:

19. Oleh yang demikian, Plaintif memohon untuk perintah-perintah seperti berikut:—

a. Defendan Pertama membuat bayaran dibawah polisi insuran kepada Defendan Kedua dalam masa tujuh (7) hari dari tarikh Penghakiman ini terhadap kemudahan pinjaman sewa beli;

...

f. Defendan Pertama membayar Plaintif gantirugi dibawah budi bicara Mahkamah Yang Mulia ini termasuk inter-alia:

i. Kecuaian;

ii. Kemungkiran duti fidusiari;

iii. Fitnah dan pencemaran nama Plaintif;

yang dibentangkan diatas, gantirugi am, gantirugi khas, gantirugi teladan, exemplari atau sebaliknya dan faedah selepas itu pada kadar dan tempoh masa yang Mahkamah Yang Mulia ini anggap sesuai manfaat;

g. Kos berdasar fee peguamcara klien atau sebaliknya yang Mahkamah yang Mulia ini anggap sesuai manfaat;

h. Sebarang arahan atau arahan selanjut selanjut berkenaan diatas dan meminda sekiranya perlu perintah-perintah yang dipohon dan/atau perintah selanjut lain yang Mahkamah Yang Mulia ini anggap sesuai manfaat.

DEFENCE

**[10]** The defendant's pleaded defence is that:

(a) the plaintiff's claim falls within the exception to the said policy; and that

(b) the plaintiff's claim is barred by s 6(1)(a) of the Limitation Act 1953 wherein limitation has already set in on 16 September 2011.

**[11]** It is not in dispute that the plaintiff notified the defendant of the loss on 14 March 2005. On 15 March 2005, the defendant appointed Mestari

Adjuster Sdn Bhd ('the adjuster') to investigate the alleged theft of the said vehicle. An investigator from the adjuster ('DW1') interviewed the plaintiff and thereafter concluded that the plaintiff had voluntarily handed over the keys and the said vehicle to the three Indian men who had identified themselves as repossessors claiming to be acting on instructions of the financier. The adjuster's report dated 30 August 2005 concluded that the alleged theft fell under the category of cheating by impersonation rather than the conventional theft or robbery classification.

**[12]** Thus, the defendant repudiated liability via its letter dated 16 September 2005 to the plaintiff and followed up with another letter dated 17 October 2005. The defendant's letter dated 17 October 2005 made reference to 'criminal breach of trust'. The plaintiff sent a letter dated 27 October 2005 (exh D1) appealing for a reconsideration of his claim. The defendant replied by letter dated 30 December 2005 (exh D2) and maintained their stand. The plaintiff claims that he never received the said letter. On 29 July 2013, the plaintiff's solicitors wrote to the defendant and enquired about the plaintiff's appeal for payment under the said policy.

## THE PLAINTIFF'S EVIDENCE

**[13]** The plaintiff's version as to how the vehicle was stolen is as stated in his witness statement. He said:

S3. Bilakah dan bagaimana kereta En. Ayob dicuri?

J3. Pada 6/1/2005 pada lebih kurang 10.30 pagi semasa saya sedang memandu kereta saya BGF 292 dari rumah saya di Jalan Langat, Kelang untuk pergi ke Hospital. Tiba-tiba saya dihempit oleh satu kereta Proton yang dinaiki oleh tiga lelaki india yang berbadan besar. Dua daripada mereka kemudiannya menghampiri kereta saya. Saya pun membuka pintu dan seorang daripada mereka telah menarik saya keluar. Setelah saya keluar daripada kereta saya kedua-dua mereka pun memasuki kereta saya.

Saya mengetuk tingkap pintu saya dan menanyakan mereka kenapa mereka mengambil kereta saya. Seorang daripada mereka menyuruh saya menghubungi bank pembiayaan saya dan terus beredar dari situ dengan kereta saya.

Setelah itu, saya pun menalifon bank saya dan mereka menyuruh saya membuat lapuran polis.

**[14]** The plaintiff then explained the circumstances relating to the claim that he made under the said policy:

S4. Bilakah En. Ayob membuat tuntutan terhadap Kurnia Insurans?

J4. Pada kali pertama saya pergi berjumpa dengan ajen insurans saya dimana saya diminta mengisi satu boring tuntutan Kurnia Insurans *(Sila lihat ms 26–27 Ikatan Dokumen Bersama)* selepas membuat lapuran polis di Balai Polis Kelang pada 6/1/2005.

*(Sila lihat ms 47 Ikatan Dokumen Bersama)*

**[15]** As for the delay in submitting his claim to the defendant, the plaintiff said:

S5. Mengapa En. Ayub telah mengambil masa lebih kurang 2 bulan untuk membuat tuntutan dengan Kurnia Insurans?

J5. Pada awalnya saya menunggu keputusan siasatan polis. Saya telah dimaklumkan oleh Pegawai Polis selepas itu bahawa saya mesti memaklumkan kepada syarikat insurans saya. Baru saya dapat tahu dan saya pun membuat tuntutan insurans tersebut.

**[16]** As for the investigation by the adjuster, the plaintiff informed the court as follows:

S6. Boleh En. Ayob memberitahu Mahkamah ini apa yang telah berlaku selepas Notis Tuntutan diberi kepada Kurnia Insurans?

J6. Beberapa bulan kemudian saya dihubungi oleh seorang pegawai yang mengenalkan dirinya sebagai seorang Loss Adjuster berkenaan dengan kecurian kereta saya dan beliau ingin berjumpa dengan saya.

Saya telah bersetuju untuk berjumpa dengan beliau dan selepas itu kami berjumpa di Restoran McDonals, Sri Andalas, Kelang.

S7. Boleh beritahu Mahkamah apakah yang telah dibincang antara En.Ayob dan pegawai Loss Adjuster tersebut?

J7. Beliau bertanya saya beberapa soalan berkenaan dengan hal peribadi saya dan berkenaan peristiwa kejadian kecurian kereta saya.

**[17]** Apparently, DW1 had recorded a statement from the plaintiff, which was tendered in court. The plaintiff claimed that what was mentioned in the statement was not true. In this regard he said:

S8. Sila rujuk kepada mukasurat 58–61 Ikatan Dokumen Bersama. Apakah dokumen ini?

J8. Ia merupakan satu penyata yang telah ditunjukkan kepada saya oleh peguam saya dimana *kebanyakkan penyataan-penyataan disana adalah tidak benar*. (Emphasis added.)

**[18]** In his attempt at explaining the delay in filing the present action, several years after his claim had been rejected by the defendant, the plaintiff said:

S9. Selepas itu, bolehkah En Ayob beritahu kepada Mahkamah sama ada apa-apa jawapan daripada Kurnia Insurans?

J9. Ya, saya dimaklumkan bahawa tuntutan saya telah ditolak.

S10. Bagaimana En. Ayob dapat tahu tuntutan En. Ayob di tolak?

J10. Saya diberitahu oleh ajen insurans saya bahawa permohonan tuntutan saya telah ditolak.

S11. Boleh En. Ayob beritahu Mahkamah apakah tindakan yang diambil oleh En. Ayob selepas situ?

J11. Saya terkejut dan selepas itu saya pergi ke pejabat insurans dan dapat jumpa seorang pegawai insurans dimana saya beritahu bahawa syarikat insurans tersebut tidak menganggap kehilangan kereta saya sebagai satu kecurian.

S12. Apakah tindakan En. Ayob selepas itu?

J12. Saya diberitahu oleh pegawai insurans tersebut yang dia akan mempertimbangkan tuntutan saya sekali lagi.

S13. Boleh En. Ayob beritahu Mahkamah bila En. Ayob telah berjumpa dengan pegawai insurans tersebut untuk membuat rayuan tuntutan insurance En. Ayob?

J13. Kalau tak salah, pada atau sekitar bulan September 2005.

## THE DEFENDANT'S EVIDENCE

**[19]** The defendant called two witnesses. The first witness was Suresh Chelliah ('DW1') (a staff of the adjuster) who had interviewed the plaintiff. He basically said that he interviewed the plaintiff and recorded a statement. He said that he recorded the statement in English although he conversed with the plaintiff in Bahasa Malaysia. DW1 said that the plaintiff read over the statement and then signed it (Mestari adjuster's report dated 30 August 2005 pp 3–22 *ikatan dokumen bersama tambahan*). There was some dispute during DW1's evidence as to the plaintiff's ability to understand English. However, I do not regard this as a matter of any significance as the defendant was no longer taking the position that the plaintiff was in any way implicated in the theft. Indeed, DW1 very candidly conceded that even his own enquiries with the police revealed that the police do not believe that the plaintiff was in any way connected to the theft and that they opined that the said vehicle was stolen through impersonation.

**[20]** The next witness for the defendant was Hisammuddin bin Mohd Hosnis ('DW2') (claims manager) who testified as follows:

4. Q: Are you aware of the claim made by the Plaintiff?

A: Based on the documents in the possession of the 1st Defendant I am

aware of the claim made by the Plaintiff. The Plaintiff made a claim against Amgeneral Insurance Berhad, the 1st Defendant/Insurer here under a Private Car Policy No. HB-3-03-C020020 (hereinafter referred to as the 'said Policy') for the loss of a motor vehicle bearing registration No. BGF 292 due to an alleged theft on 6.1.2005.

...

7. Q: After receiving the Adjuster's report what did the 1st Defendant do?

A: After receiving the Adjuster's report, we noted that the Plaintiff's claim was not covered by the policy. Thus, the 1st Defendant issued a repudiation letter to the Plaintiff on the 16.9.2005 repudiating liability.

8. Q: Please refer to page 44 of the Common Bundle of Documents. Please explain this document.

A: This is the repudiation letter referred to earlier. We repudiated liability as the nature of the loss is due to cheating and it falls under the policy item 4(c) Exception to Section A which reads as:

We will NOT pay for :

Any loss or damage caused by or attributed to the act of cheating / criminal breached of trust by any person within the meaning of the definition of the offence of cheating/criminal breached of trust set out in the penal code.

The 1st Defendant also issued a detailed explanation to the Plaintiff on 17.10.2005 explaining the basis of repudiation.

9. Q: Please refer to page 44 of the Common Bundle of Documents. Please explain this document.

A: This is the detailed explanation by the 1st Defendant to the Plaintiff explaining the basis of repudiation.

10. Q: What happened after the letter of repudiation?

A: The Plaintiff appeal against the repudiation vide his letter dated 27.10.2005.

11. Q: Upon receiving the Plaintiff's appeal letter dated 27.10.2005, what did the 1st Defendant do?

A: We replied vide our letter dated 30.12.2005 and reiterated that the Plaintiff's claim cannot be considered and that we maintained our repudiation as per our letter dated 16.9.2005.

12. Q: Please refer to page ..... of the Additional Common Bundle of Documents, what is this document?

A: This is the reply dated 30.12.2005 which we reiterated that the Plaintiff's claim cannot be considered.

...

15. Q: Does the Plaintiff have a valid claim against the 1st Defendant?

A: No, firstly because the 1st Defendant had on 16.9.2005 repudiated liability under the grounds as stated above, and the Plaintiff's claim is now time barred wherein limitation had already set in on 16.9.2011 since it has been more than 8 years since the loss and our repudiation of the claim.

THE EVIDENCE OF THE ADJUSTER APPOINTED BY THE DEFENDANT

**[21]** The relevant part of DW1's testimony is as follows:

Q: Please refer to page 50 of the Common Bundle of Documents (CBOD), is this your report?

A: Yes it is my report dated 30.8.2005.

Q: Please refer to para 2 at page 57 of the Common Bundle of Documents, can you explain to Court the contents of the said para?

A: The Plaintiff maintained his stand in his police report and the statement recorded by us i.e. that on 6.1.2005 at about 10.30 am, whilst he was driving the said vehicle along Jalan Langat Klang, a vehicle with 3 Indian men blocked the vehicle and informed him that they intended to repossess the said vehicle. They did not show him a repossession order but instead flashed an identification card. They then took over the said vehicle. However, in his claim form, he alleged that the culprits pulled him out of the Benz and forcibly took the said vehicle.

Q: What is your conclusion?

A: In light of the circumstances surrounding the loss, I am of the opinion that the insured was deprived of his vehicle by way of cheating, which falls under the exclusion of the insurance coverage. Hence the policy would not respond to the loss. Policy liability is therefore not apparent in this instance. I stated this in my report.

THE ISSUES

**[22]** The issues that had to be determined are as follows:

(a) whether the plaintiff's claim falls within item 4(e) of the exception to the said policy; and

(b) whether the plaintiff's claim was time barred under s 6 of the Limitation Act 1953.

*Whether the plaintiff's claim fall within item 4(e) of the exception to the policy?*

**[23]** During the trial, counsel for the defendant readily (and I might add quite fairly) conceded that the defendant was not taking the position that the plaintiff had colluded, conspired or collaborated with the three Indian men who accosted him on 6 January 2005 along Jalan Langat, Kelang and took away the said vehicle. Obviously, if he did collude in respect of the theft then the plaintiff would be in effect be cheating the insurer (the defendant). However, the defendant is not taking such a position.

**[24]** Counsel said that even though the defendant was not alleging that the plaintiff had cheated the defendant, nevertheless, the fact that the plaintiff had been the 'victim' of cheating by the three Indian men, rendered the claim as one which fell within item 4(e) of the exception to the said policy.

**[25]** Counsel maintained that although the plaintiff himself was not implicated in the theft of the vehicle, the fact that he voluntarily handed over the keys to the purported 'repossessors' from the financier was sufficient to trigger the exception the policy. In this regard, it is imperative to note that the plaintiff did not admit that he voluntarily handed over the key. The notion that the plaintiff had voluntarily handed over the keys was merely a conclusion that was reached by DW1. The plaintiff did not say or admit that he voluntarily gave up the keys.

**[26]** Hence, on the issue of the plaintiff voluntarily handing over the keys, the plaintiff explained that he had no choice and that the situation at the scene was such that he felt compelled to hand over the keys as the three Indian men claimed that they were repossessors. It was later that he discovered from the financier that they had not sent or instructed any repossessors to take custody of the vehicle. It was then that the plaintiff realised that he had been duped into parting with the vehicle. In effect, the vehicle was stolen by persons who impersonated as repossessors from the financier. All of this would mean that the plaintiff was only a victim of a crime committed by the three men on 6 January 2005.

**[27]** Of course, all of this is quite startling since the letters from the defendant seemed to suggest or imply that the plaintiff was implicated in the theft. This may in fact be gleaned from the defendant's letter dated 17 October 2005 where the defendant had referred to the definition of 'criminal breach of trust' under the said policy, which can only mean that the plaintiff was being implicated in some form of criminal breach of trust.

**[28]** I posed a query to counsel for the defendant on the rationale for the issuance of the defendant's letter dated 17 October 2005. I received no response. In any event, counsel for the defendant eventually took the position that despite the plaintiff's lack of criminal participation or culpability for the

theft or cheating or criminal breach of trust, the defendant was nevertheless entitled to decline liability under item 4(e) of the exception to the said policy. Counsel took the position that liability under the said policy does not arise even where the insured was the victim of cheating perpetuated on him by others with whom the insured has no connection.

**[29]** Counsel for the plaintiff submitted that the conclusion made by DW1 that the loss of the said Mercedes car falls under the category of cheating by impersonation instead of theft was erroneous. He emphasised that theft can be defined as the property being dishonestly appropriated with intention of permanently depriving the lawful owner of the same which is exactly the case in question herein. Since the said policy does not define 'theft', it becomes necessary therefore to rely on the Penal Code definition for the offence of theft. Section 378 of the Penal Code defines theft as follows:

> Whoever, intending to take dishonestly any movable property out of the possession of any person without that person's consent, moves that property in order to such taking, is said to commit theft.

**[30]** A similar issue arose in the case of *Malaysian Motor Insurance Pool (formerly known as HRMIP) v Naza Motor Trading Sdn Bhd* [2012] 1 MLJ 16 ('the *Naza Motor*'s case'), where the insured vehicle was handed over to a prospective 'buyer' who was purportedly interested in buying the vehicle and wanted to take the vehicle for 'test drive'. In that case, the 'prospective buyer' took the insured vehicle on the pretext of a 'test drive' and never came back. The insured claimed under the policy on the basis that the vehicle had been stolen. In the High Court the insured's claim was dismissed as the court held that the insured vehicle was lost through cheating and that the exception to the policy applied. The Court of Appeal took a different view and held that the insured vehicle was lost on account of theft. They allowed the insured's appeal. The insurer appealed to the Federal Court. The Federal Court agreed with the Court of Appeal and held that the conclusion that is to be made from factual situation which led to the loss of the insured vehicle suggested quite unequivocally that the insured vehicle was stolen by someone pretending to be a prospective buyer.

**[31]** In that case, the Federal Court had granted leave in respect of the following questions of law:

> In interpreting a policy of insurance to determine if a given event is covered under the policy, what are the rules of interpretation in the following circumstances:
>
> (a) When the coverage agreement (section I — theft is covered) and the exclusion clause (exception 8 — cheating is excluded) are both applicable. Is the event (loss of the motor vehicle) covered?

(b) When the coverage agreement (section I — theft is covered) and the exclusion clause (exception 8 — cheating is excluded) are both applicable. Does the contra proferrantum rule of construction apply?

(c) When the exclusion clause (exception 8 — cheating is excluded) applies, must cheating be that of the insured (respondent)?

**[32]** The Federal Court examined the wordings of the policy in the *Naza Motor*'s case and concluded that the insurers were liable. The conclusions of the Federal Court may be taken from the following passages:

> [12] We agree with the finding of the Court of Appeal that the loss of the motorcar was a result of the theft and not cheating. The said customer had dishonestly taken away the motorcar without the consent of the plaintiffs sales representative. Although the said customer was given possession of the motorcar, it was only for a specific limited purpose, namely to test drive accompanied by the plaintiff's sales representative. The consent if at all given by the plaintiff was not an unqualified one and was not for a false representation by the said customer. On this point we would refer to a passage from the *Indian Penal Code* by Ratanlal & Dhirajlal (31st Ed), at p 2022 which states as follows:
>
> > The thing stolen must have been taken without the consent of the person in possession of it ... But consent given under improper circumstances will be of no avail [vide ill (c)]. Consent obtained by a false representation which leads to a misconception of facts will not be a valid consent.
>
> [13] We could not agree with the contention of the defendant that if the court finds the loss was due to theft as well as the loss could also be attributed to cheating then the plaintiff's claim would still not succeed. We find that the facts of the case could not fit with any of the explanations or illustrations as envisaged by s 415 of the Penal Code to fall under the offence of cheating.
>
> [14] It is our considered view based on the facts of the present case even if there is any element of deceit by the said customer it was just to facilitate the commission of the act of theft. On this point, it is appropriate to quote what Lord Atkinson said in *Lake v Simmons* [1927] AC 487 (HL) at p 511, which reads as follows:
>
> > I think Miss Esme Ellison obtained the possession of the jewellery handed to her by the appellant by an operation which is appropriately described as larceny by a trick. That, when she got possession of it, she feloniously appropriated it, is not disputed. But the operation of entrusting the possession of the jewellery but not the property in it to her, which prima facie, would mean handing it over to her to be devoted by her to some legitimate purpose, was treated rather as if it were something separable from, and unconnected with, the theft committed. It really was nothing of the kind. The theft was a composite thing. It consisted first of the false representation the woman made to the appellant, which he apparently believed, secondly, the action he took, acting on that belief, and third, the felonious appropriation of the goods when obtained by her to her own use. The so-called entrusting of the jewels to her, furnished to her-as she intended it should — the opportunity for and means of committing the theft.

**[33]** In my view, the facts of the present case are not very different from the *Naza Motor*'s case. Just as the insured in the *Naza Motor*'s case had allowed the 'buyer' to take possession of the motorcar, here too the plaintiff parted with the said vehicle as he genuinely believed that the three men were motorcar repossessors from the finance company. In the *Naza Motor*'s case, the insured motor car was handed over to someone who they thought was a genuine buyer but who in reality was a thief pretending to be a buyer. By parity of reasoning, the three men in the instant case who took the vehicle from the plaintiff on 6 January 2005 can similarly be described as car thieves who pretended to be motor car repossessors.

*The contra proferentem rule*

**[34]** Counsel for the plaintiff submitted alternatively that even if the factual matrix of the present case is to be regarded as giving rise to an act of cheating by impersonation, there is enough doubt or controversy about the meaning to be placed on the exception to the said policy as would entitle the plaintiff to invoke the contra proferentem rule.

**[35]** In this regard, counsel submitted that it is not entirely clear from the exception to the said policy that liability may be denied even where the insured is not implicated in any cheating and is in fact a victim of cheating. Counsel relied upon the oft cited passage from the decision of the Federal Court in *Malaysia National Insurance Sdn Bhd v Abdul Aziz bin Mohamed Daud* [1979] 2 MLJ 29, where the court had applied the contra proferentem rule to an exemption clause and held that:

> (2) as between the assured and the insurers, the exception clause in the proviso has on the ordinary principles of construction to be read against the insurance company, that is to say, if there were any doubt as to its extent and the question were to arise as to the liability of the insurers, the construction most favorable to the assured must be given to it;
>
> (3) the question of public policy did not apply in this case, as the respondent had not been guilty of a willful and culpable crime which made out contrary to public policy to allow him to be indemnified.

**[36]** Counsel also relied upon the decision of the High Court in *Syarikat Uniweld Trading v The Asia Insurance Co Ltd* [1996] 2 MLJ 160 particularly at p 167 (para 4), where the learned Abdul Malik Ishak J said with customary clarity and lucidity as follows:

> It is for this reason that an insurance policy, like the one before me now, should be construed in accordance with sound commercial principles and good business sense, so that its provisions receive a fair and sensible application: *Martin (John) of London v Russell* [1960] 1 Lloyd's Rep 554 at p 565; *Lowenstein (J) & Co v Poplar Motor Transport (Lymm), Gooda (Third Party)* [1968] 2 Lloyds' Rep 233 at p 238.

The literal meaning of the words in the insurance policy must not be allowed to prevail where it would produce an unrealistic and generally unanticipated result as envisaged in *Lowenstein (J) & Co v Poplar Motor Transport (Lymm), Gooda (Third Party)* [1968] 2 Lloyds' Rep 233 at p 238. The literal meaning of the words in the insurance policy must not be allowed to prevail where it would produce an unrealistic and generally unanticipated result as envisaged in *M'Cowan v Baine & Johnston & Ors* [1891] AC 401 at p 403; *Re Etherington and the Lancashire and Yorkshire Accident Insurance Co* [1909] 1 KB 591 at p 597; and *Westminster Fire Office v Reliance Marine Insurance Co* (1903) 19 TLR 668. An unanticipated result in the context of the present appeal would be to absolve the respondent as an insurer from liability on the chief risks sought to be covered by the insurance policy. Thus, in an insurance policy where the main purpose was to insure against damages arising from negligent acts by the insured, it was held that a condition that 'the insured shall take reasonable precautions' could not be so construed that every negligent act was a breach of it (*Fraser v Furman (BN)(Productions), Miller Smith & Partners (A Firm) Third Party* [1967] 3 All ER 57; and *Cornish v The Accident Insurance Co Ltd* [(1889) 23 QBD 453). *It is not out of place to mention that in interpreting any clause of an insurance policy, one must bear in mind the commercial object or function of the clause and its apparent relation to the contract as a whole (Kearney v General Accident Fire and Life Assurance Corp* [1968] 2 Lloyd's Rep 240; and *L Schuler AG v Wickman Machine Tool Sales Ltd* [1974] AC 235 at pp 251 and 265). *In adopting this approach, it becomes apparent that the literal meaning of the clause in the insurance policy must necessarily yield to business sense so that an ambiguity in the wording can be resolved*. (Emphasis added.)

**[37]** Having regard to the arguments that were canvassed for both sides, I take the view that the loss of the vehicle was due to an event of theft by three unknown persons. They pretended to be repossessors form the finance company. I really do not see any difference between pretending to be a buyer in a motor showroom (the *Naza Motor*'s case) and a person pretending to be a repossessor from a finance company (the present case). In both situations, the individuals intended to and did steal the vehicle. Ultimately, the vehicles were stolen from the rightful owners. As such, I would say at the outset that any attempt to distinguish the instant case from the *Naza Motor*'s case would be an attempt at futility.

**[38]** Based on the above I am inclined to agree with the submissions made by counsel for the plaintiff that there is room for a difference of opinion as to whether the exception under the said policy only applies when the insured is implicated or whether it applies even when the insured is but a mere victim of cheating by impersonation.

**[39]** It is relevant to note that in the *Naza Motor*'s case, the Federal Court answered questions (a) and (b) in the affirmative, which means that the contra proferentum rule was held as being applicable. However, the Federal Court did not answer the question as to whether the exclusion of liability for cheating

must mean that it has to be cheating by the insured. The Federal Court considered it unnecessary to deal with that question because the court had concluded that the loss of the insured vehicle was due to theft and not due to cheating. This is what the Federal Court said:

> [20] In conclusion we would state here that since we have affirmed the finding of the Court of Appeal that the loss is due to theft and not cheating, there is therefore no conflict between the relevant provisions of the insurance clauses for our determination. The questions posed in this appeal are now purely academic. For completeness we would nevertheless answer the questions posed by stating that the court ought not to interpret the clauses of the insurance policy which would result in the insured loosing the benefits of the coverage what it appears to have granted under the coverage clause by applying the exclusion clause to exclude liability. *Therefore, questions (a) and (b) are answered in the affirmative*. Since the exclusion cl 8 of the insurance policy relating to offence of cheating does not apply in this case there is no necessity for us to answer question (c). (Emphasis added.)

**[40]** In my view the issue of whether the exception applies only when cheating is committed by the insured is an open and vexed question. I am of the opinion that it would be rather strange that insurance cover is lost when the insured is not the cheat but only the victim. Whatever may be the final answer to this point, I am of the view that presently, there is enough doubt about the exception to the said policy so as to trigger the contra proferentum rule in favour of the plaintiff.

**[41]** Although the point was not really pressed or explored during the trial, I would say that the situation in which the plaintiff found himself in is a most invidious one. On the one hand he thought (but could not be sure) that the three men were repossessors. On the other hand, they could well be motorcar thieves. In both scenarios, the plaintiff would have no choice and all that he had was perhaps 'Hobson's choice' (no choice) and had to just hand over the keys. DW1 opined that the plaintiff 'voluntarily' handed over the keys. In the present case, it would not be fair to say that the plaintiff voluntarily parted with the said vehicle. Rather, the said vehicle was taken from him by the three men who pretended to be repossessors.

**[42]** It is obvious that the plaintiff had no choice as he really did not know what he was dealing with. Hence the safest thing to do would be to hand over the keys as there is no telling on what could have happened if he refused to give the keys. It is of course easy and speculative on hindsight to suggest what the plaintiff could have done at the point when he was confronted by the three men along Jalan Langat, Klang on 6 January 2005.

**[43]** In my view, the plaintiff's reaction was normal, reasonable and sensible in light of all the circumstances on 6 January 2005. Hence, it is my view that

the exception to the policy does not apply as this was a case of theft (as per *Naza Motor*'s case) and in any event, I am satisfied that there is enough doubt or ambiguity as to whether the exception under the said policy applies when the insured is a victim of cheating by impersonation such that the clause in the said policy is to be construed contra proferentem against the insurer (the defendant).

*Limitation*

**[44]** The next point relates to limitation. The issue of limitation falls to be considered by reference to three letters issued by the defendant. The letters are dated 16 September 2005, 17 October 2005 and 30 December 2005.

**[45]** The defendant's letter dated 30 December 2005 is in response to the plaintiff's letter dated 27 October 2005. However, during the trial, the plaintiff claimed that he had no knowledge of the letter which is said to have been written by him, although he did not explicitly disavow the signature which appeared in the document. It was pointed out that in the so called letter issued by the plaintiff dated 27 October 2005 the plaintiff's signature appears next to a mark 'x'. Counsel for the plaintiff suggests that there is something not quite right about the letter.

**[46]** He also said that the plaintiff never received the defendant's reply dated 30 December 2005 and this explains why the plaintiff kept up with his monthly payments to the financier as he had spoken to an officer from the defendant and was given to understand that his 'appeal' was being considered. Also, the plaintiff relied upon the letter written by his solicitor dated 29 July 2013 whereby the plaintiff's solicitor had enquired about the status of the plaintiff's claim/appeal.

**[47]** The plaintiff's answer to the defendant's plea of limitation is that his claim/appeal to the defendant was still alive as he had spoken to an officer in the defendant's office and was told that it was being considered. As such, it was contended that time was still at large and that limitation had not set in.

**[48]** As far as the plaintiff's so called letter dated 27 October 2005 (exh D1) and the defendant's reply dated 30 December 2005 (D2) are concerned, I noted that the originals were taken out of the defendant's file which was made available to the court and marked as exhibits accordingly. They were then subjected to cross-examination. However, I do not find these letters to be in any way sinister. Indeed, I would venture to say that it would have been natural for the plaintiff to send the letter dated 27 October 2005 asserting his innocence and that he did not voluntarily hand over the keys.

**[49]** Indeed, looking at the letter (which may well have been prepared by someone else for and on behalf of the plaintiff – which may explain the mark 'x' on the document) it is obvious that it was a letter which benefits the plaintiff and is not one which is to his detriment. The letter is exculpatory and asserts the very position that the plaintiff's is seeking to establish in court; that he was duped into parting with the said vehicle.

**[50]** Indeed, if the plaintiff's letter was a fabrication, an attempt would have been made to erase the mark 'x' instead of leaving it intact as a sort of 'tell tale' sign. In my view, it is more probable than not that the plaintiff was the author of the letter dated 27 October 2005, which had been replied to by the defendant on 30 December 2005 (exh D2).

**[51]** It is my conclusion therefore that the plaintiff's suggestion that exh D1 was not issued by the plaintiff is plainly implausible and in defiance of logic. As such, I hold that the plaintiff's letter (exh D1) and the defendant's reply dated 30 December 2005 (exh D2) were in fact issued by the plaintiff and defendant respectively. On the evidence I am satisfied that the defendant's letter dated 30 December 2005 was issued and sent to the plaintiff and in accordance with the postal rules, he ought to have received it in the ordinary course of post.

**[52]** Indeed, if the plaintiff did not receive the defendant's letter dated 30 December 2005, then it is strange that there was no follow up by the plaintiff within a reasonable period of time. In all probability, the plaintiff did receive the defendant's letter dated 30 December 2005 and it was only several years later that the plaintiff decided to send a lawyer's letter enquiring about the status of his claim under the said policy. In any event, regardless of the issue of the alleged non-receipt by the plaintiff of the defendant's letter dated 30 December 2005, it is my view that the defendant's letter of repudiation dated 16 September 2005 is the critical document for purposes of computing time under the Limitation Act 1953.

**[53]** Thus, in so far as the issue of limitation is concerned, the position in law is that time begins to run from the earliest point of time when the plaintiff could commence an action. The principle in this regard was succinctly stated by the Federal Court in *Nadefinco Ltd v Kevin Corporation Sdn Bhd* [1978] 2 MLJ 59 at p 61 where His Lordship Suffian LP quoted the case of *Reeves v Butcher* [1891] 2 QB 509 per Lindley LJ at p 511:

> The right to bring an action may arise on various events; but it has always been held that the *statute runs from the earliest time at which an action could be brought*. (Emphasis added.)

**[54]** Hence, the critical question for purposes of limitation is: when did the cause of action arise and this necessarily calls for an examination of the concept of 'cause of action'. A recent discussion on the definition of cause of action is to be found in the judgment of the Federal Court in *Tenaga Nasional Bhd v Kamarstone Sdn Bhd* [2014] 2 MLJ 749, where all the leading cases on the definition of cause of action have been helpfully set out in the judgment. As such, I have reproduced several passages from that case which elucidate the law on this point:

> [12] In *Letang v Cooper* [1965] 1 QB 232, at pp 242–243, Lord Diplock defined a 'cause of action' as 'a factual situation the existence of which entitled one person to obtain from the court a remedy against another', which definition was adopted in *Hock Hua Bank Bhd v Leong Yew Chin* [1987] 1 MLJ 230, where Abdul Hamid Ag LP, as he then was, appended that 'there must be a cause of action before a plaintiff can claim a relief in an action'. In *Government of Malaysia v Lim Kit Siang United Engineers (M) Berhad v Lim Kit Siang* [1988] 2 MLJ 12 at p 19, the Supreme Court per Salleh Abbas CJ, expounded that to make up 'a cause of action', first, the plaintiff has a right at law or by statue and secondly, the right has been affected by the act of the defendant:
>
> > A cause of action is a statement of facts alleging that a plaintiff's right, either at law or by statute, has, in some way or another, been adversely affected or prejudiced by the act of a defendant in an action. Lord Diplock in *Letang v Cooper* [1965] 1 QB 232 at p 242 defined 'a cause of action' to mean 'a factual situation, the existence of which entitles one person to obtain from the court a remedy against another person'. In my view the factual situation spoken of by Lord Diplock must consist of a statement alleging that, first, the respondent/plaintiff has a right either at law or by statute and that, secondly, such right has been affected or prejudiced by the appellant/defendant's act.
>
> [13] But other than that addendum by Salleh Abas CJ, the definition of 'cause of action' as expounded in *Letang v Cooper* was readily adopted, by the former Supreme Court in *Newacres Sdn Bhd v Sri Alam Sdn Bhd* [1991] 3 MLJ 474 and *New Zealand Insurance Co Ltd v Ong Choon Lin (t/a Syarikat Federal Motor Trading)* [1992] 1 MLJ 185, and by the Court of Appeal in *Indah Desa Saujana Corp Sdn Bhd & Ors v James Foong Cheng Yuen, Judge, High Court Malaya & Anor* [2008] 2 MLJ 11, *Lembaga Kumpulan Wang Simpanan Pekerja v Ong Lian Chee (suing as administrator of the estate of Goh Tin Poh, deceased)* [2010] 4 MLJ 762, and *Harapan Permai Sdn Bhd v Sabah Forest Industries Sdn Bhd* [2011] 2 MLJ 192.
>
> [14] Other authorities, inter alia, *Tuan Haji Ishak bin Ismail & Ors v Leong Hup Holdings Bhd and other appeals* [1996] 1 MLJ 661, *Mohamed Yusop bin Abdul Wahab v American Express (M) Sdn Bhd* [2002] 6 MLJ 507, *Goh Joon v Kerajaan Negeri Johor & Ors* [1998] 7 MLJ 621, applied the following definition found in *Stroud's Judicial Dictionary* (5th Ed) at p 378: A 'cause of action' is the entire set of facts that gives rise to an enforceable claim; the phrase comprises every fact which, if traversed, the plaintiff must prove in order to obtain judgment (per Esher MR, *Read v Brown* (1988) 22 QBD 128; this case was applied in *Bennett v White* [1910] 2 KB 643).
>
> [15] In *Nasri v Mesah* [1971] 1 MLJ 32, the Federal Court per Gill FJ, as he then

was, depicted 'a cause of action' as follows:

> A 'cause of action' is the entire set of facts that gives rise to an enforceable claim; the phrase comprises every fact which, if traversed, the plaintiff must prove in order to obtain judgment (per Lord Esher MR in *Read v Brown* (1888) 22 QBD 128 at p 131). In *Reeves v Butcher* [1891] 2 QB 590 at p 511 Lindley LJ said:

[16] Gill FJ, then thus enunciated on 'the date of accrual' in the case of a debt:

> This expression, 'cause of action', has been repeatedly the subject of decision, and it has been held, particularly in *Hemp v Garland* LR 4 QB 509 at p 511, decided in 1843, that the cause of action arises at the time when the debt could first have been recovered by action. The right to bring an action may arise on various events; but it has always been held that the statute runs from the earliest time at which an action could be brought.
>
> In *Board of Trade v Cayzer, Irvine & Co* [1927] AC 610 at p 617. Viscount Dunedin described 'cause of action' as that which makes action possible. Now, what makes possible an action founded on a contract is its breach. In other words, a cause of action founded on a contract accrues on the date of its breach. Similarly, the right to sue on a contract accrues on its breach. In the case of actions founded on contract, therefore, time runs from breach (per Field X in *Gibbs v Guild* 8 QBD 296 at p 302). In the case of actions founded on any other right, time runs from the date on which that right is infringed or there is a threat of its infringement (see *Bolo*'s case LR 57 IA 74). It would seem clear, therefore, that the expressions 'the right to sue accrues', 'the cause of action accrues' and 'the right of action accrues' mean one and the same thing when one speaks of the time from which the period of limitation as prescribed by law should run.

[17] And Nasri v Mesah, we observe, is still good law (see the Federal Court cases of *Loh Wai Lian v SEA Housing Corporation Sdn Bhd* [1984] 2 MLJ 280, *Insun Development Sdn Bhd v Azali bin Bakar* [1996] 2 MLJ 188 and *The Great Eastern Life Assurance Co Ltd v Indra Janardhana Menon (representing the estate of the deceased, NVJ Menon)* [2006] 2 MLJ 209, which followed *Nasri v Mesah*) which we readily endorse. A cause of action founded on a contract accrues on the date of its breach, and in the case of a debt, the cause of action arises at the time when the debt could first have been recovered by action.

(see pp 757–759 of the judgment)

**[55]** Hence, in the present case there were three letters that were issued by the defendant ie letter dated 16 September 2005, 17 October 2005 and 30 December 2005. By the defendant's letter dated 16 September 2005, it was clear that the defendant was declining liability. In fact, the letter dated 16 September 2005 is captioned as 'Notice of Repudiation'.

**[56]** Thus, upon receipt of the defendant's letter dated 16 September 2005, the plaintiff was already entitled to commence an action for wrongful repudiation of the contract of insurance between the plaintiff and the defendant. It was therefore correctly submitted by counsel for the defendant

that the plaintiff had to file his action within six years from 16 September 2005 failing which the action would be time barred.

**[57]** In the present case the action was filed on 7 April 2014. As a such, the plaintiff's action is plainly time barred. However, it was argued for the plaintiff that 'time was at large' and that limitation had not sent in as the plaintiff was at all times under the impression that his claim/appeal was being considered. The plaintiff has relied on waiver and estoppel in order to defeat the defence of limitation.

**[58]** In this regard, other than his mere say-so, evidentially there is nothing to corroborate the plaintiff's claim that he spoke to an officer of the defendant who had assured him that his claim was being considered. Now, although there is nothing in writing, it does not mean that the plaintiff was not telling the truth. In fact, he may well be telling the truth and may have spoken to the defendant's officer or staff. However, even if the plaintiff had spoken to someone, it does not immediately translate into a sort of estoppel or waiver against the defendant.

**[59]** Indeed, if estoppel or waiver is to be raised then the factual basis has to be clearly and precisely demonstrated. In *Syarikat Kemajuan Timbermine Sdn Bhd v Kerajaan Negeri Kelantan Darul Naim* [2015] 3 MLJ 609, the Federal Court rejected the appellant's plea of estoppel against a defence of limitation which the respondent was relying on. In that case, the defence of limitation did not succeed in the High Court. On appeal to the Court of Appeal, the appellant/defendant succeeded in asserting the defence of limitation. The Court of Appeal opined that the appellant/defendant did not represent that they would not rely on limitation. The Federal Court agreed with the Court of Appeal. The Federal Court quoted the following passage from the judgment of the Court of Appeal which said:

> Finally, on the issue of the applicability of s 29 of the Limitation Act, we are satisfied on an examination of the correspondence exchanged between the parties following the termination notice that *the appellant did not at any time either by way of representation or conduct unequivocally cause the respondent to believe that the appellant would not rely on the defence of limitation so long as settlement negotiations were ongoing*. On the contrary, we are satisfied that it was the respondent who was pursuing negotiations with little or no positive interest on the part of the appellant in the direction of settlement and the offer to not pursue legal proceedings against the appellant originated from the respondent of its own volition. It is also our considered view that the allegation of the respondent that the commencement of time to compute the defence of limitation should be postponed because of a fraud perpetrated by the appellant is nothing but a red herring. (Emphasis added.)

**[60]** Here, the plaintiff's basis for asserting estoppel or waiver against the defendant falls completely flat as he has not identified the officer or staff

concerned and has not precisely recounted what was promised. In my view, it is unlikely that the defendant's officer or staff would have promised the plaintiff that his claim would be entertained. Even if a promise was made, it would be necessary to determine whether the promise (if any) was made by someone who was authorised to make the so-called promise. There are just too many permutations about the issue of waiver/estoppel and uncertainty which is incapable of verification.

**[61]** Whilst I am prepared to entertain the possibility and even the probability that the plaintiff may have spoken to someone in the defendant's employment, that per se, cannot be equated with a firm and unequivocal promise or representation that the plaintiff's claim would be entertained. Assuming that the unnamed person within the defendant's employment did say that his appeal was being considered, that too cannot be exalted to the status of a representation that all is well and that his claim would be entertained. Indeed, I find it quite extraordinary that the plaintiff had done nothing between 30 December 2005 and issuance of his solicitors letter on 27 July 2013 to formally enquire from the defendant as to the status of his 'appeal', if at all the so-called appeal was truly being considered. What the plaintiff ought to have done as a matter of prudence is to have written to the defendant and given them an ultimatum that he would (before limitation sets in) file an action unless he received a favourable response from the defendant.

**[62]** Also, it will be noted that the defendant's letters dated 16 September 2005 and 17 October 2005 repudiating liability had clearly and unequivocally intimated to the plaintiff that he could lodge a complaint with the Financial Mediation Bureau which is a body under the auspices of Bank Negara Malaysia and that may have resolved the matter fairly expeditiously and economically. However, for reasons best known to the plaintiff, he chose not to pursue the matter with the Financial Mediation Bureau.

**[63]** Of course, it is true that all along the plaintiff continued making payments to his financier but that's a different matter altogether and I am not inclined to accept the suggestion that an inference should be drawn that the plaintiff continued making payments because it was represented to him that the defendant would allow his claim under the said policy and that payment would be forthcoming.

**[64]** I accept that the plaintiff has suffered considerably as a result of the episode on 6 January 2005. But even before that he appears to have had financial difficulties which lead to the judgment in default being entered against him.

**[65]** To his credit, he made a considerable amount of payment to the financier even after judgment in default had been entered against him. Eventually he could not make payments to the financier, which resulted in the latter commencing bankruptcy proceedings. On 19 June 2014 the plaintiff was adjudicated a bankrupt. The present suit has been filed with the sanction of the Ketua Pengarah Insolvensi.

**[66]** The result that I have reached at the end of this rather unfortunate episode is that the plaintiff had a valid cause of action against the defendant for wrongful repudiation of liability under the said policy.

**[67]** However, the plaintiff's action herein which was filed on 7 April 2014 is time barred and there is no legal basis for depriving the defendant of the benefit of the defence of limitation.

**[68]** In the circumstances, it is my conclusion that the plaintiff's claim should be and is hereby dismissed. In my view of the plaintiff's status as a bankrupt, I make no order as to costs.

*Plaintiff's claim dismissed with no order as to costs.*

Reported by Kanesh Sundrum